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### Property Exempt from Process—How House Bill 1039 Updated and Clarified North Dakota's Outdated Exemption Scheme, and a Call for Further Reform

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PROPERTY EXEMPT FROM PROCESS—  
HOW HOUSE BILL 1039 UPDATED AND CLARIFIED  
NORTH DAKOTA’S OUTDATED EXEMPTION SCHEME,  
AND A CALL FOR FURTHER REFORM

ABSTRACT

North Dakota’s Sixty-first Legislative Assembly passed House Bill 1039 on April 24, 2009. The bill made significant and much needed changes to North Dakota’s exemption scheme. The bill, which went into effect August 1, 2009, clarified and revised several of the exemptions, clarified who is able to claim certain exemptions, and revised the value of property that is able to be claimed as exempt. Although House Bill 1039 made greatly needed updates and clarifications to North Dakota’s exemption scheme, there still remains much room for reform. A single exemption could provide many benefits to both debtors and creditors, as well as to the court system. Allowing a debtor to choose between state and federal exemptions in bankruptcy could also increase the efficiency of filing for bankruptcy in North Dakota. Nationwide uniformity in exemption laws would also reduce unfair treatment received by debtors and creditors across state lines.

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## I. INTRODUCTION

In 2009, at the direction of the North Dakota Legislature, the Judicial Process Committee conducted a study of the exemption laws contained in North Dakota Century Code (N.D.C.C.) chapter 28-22.<sup>1</sup> The study focused on determining whether the North Dakota exemptions, in their current form, continued “to serve the historical purposes of protecting debtors from creditors and providing debtors with the basic necessities of life, so that debtors will not be left destitute and public charges of the state.”<sup>2</sup> To aid its study, the committee sought testimony and recommendations from local experts in the areas of exemption and bankruptcy law.<sup>3</sup> The testimony of these individuals, along with the results of the study, indicated North Dakota’s exemption scheme was outdated and needed to be revised.<sup>4</sup>

The deliberations of the committee focused on the recommended changes to the state’s exemption scheme.<sup>5</sup> Based on the recommendations, the committee considered four bill drafts.<sup>6</sup> The first bill draft clarified several of the exemptions contained in N.D.C.C. chapter 28-22 and limited their availability.<sup>7</sup> The second bill draft modified the dollar amount limits on several of the exemptions.<sup>8</sup> The third bill draft virtually eliminated the current exemption scheme and replaced it with one lump sum exemption of \$40,000.<sup>9</sup> The fourth bill draft considered by the committee would have

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1. See H.R. 1213, 60th Legis. Assemb. (N.D. 2007) (providing for a legislative council study of state bankruptcy exemptions); S.B. 2284, 60th Legis. Assemb. (N.D. 2007) (directing a study of the exemption provisions found in North Dakota Century Code chapter 28-22). Because the studies called for by these bills were so similar, they were combined into one comprehensive study. JUDICIAL PROCESS COMM., 2009 LEGISLATIVE COUNCIL FINAL REPORT, H.B. 1039, 61st Legis. Assemb., at 209 (N.D. 2009) [hereinafter FINAL REPORT]. It is common for study resolutions to be passed in both houses. *Interim Study Procedure*, NORTH DAKOTA LEGISLATIVE BRANCH, <http://www.legis.nd.gov/council/general/interim.html> (last visited Nov. 19, 2010). These interim studies are assigned to committees by Legislative Management. *Id.* Legislative Management also appoints the members of the committees, who primarily consist of legislators and sometimes citizens who “can provide special expertise or insight for a study.” *Id.* The committees hold meetings where testimony is heard and information is reviewed. *Id.* The committees make recommendations and submit their reports to Legislative Management where the recommendations are accepted, amended, or rejected. *Id.* The accepted recommendations, along with their necessary bills and resolutions, are then presented to the Legislative Assembly. *Id.*

2. FINAL REPORT, *supra* note 1, at 209.

3. *Id.* at 215. The individuals who testified included bankruptcy attorneys, attorneys who represent debtors and creditors, a bankruptcy trustee, and a professor at the University of North Dakota School of Law who teaches debtor-creditor and bankruptcy law. *Id.*

4. *Id.*

5. *Id.* See discussion *infra* Part III.D.2.

6. FINAL REPORT, *supra* note 1, at 215.

7. *Id.* at 216.

8. *Id.*

9. *Id.* at 217. Although testimony regarding this bill draft suggested a lump sum exemption would reduce litigation and prevent fraudulent transfers of property and improper pre-bankruptcy

given North Dakota residents the option of claiming either federal or state exemptions when filing a petition for bankruptcy.<sup>10</sup> Ultimately, the committee merged together the first two bill drafts, along with a few amendments, to create House Bill 1039, which was introduced to the North Dakota Legislative Council.<sup>11</sup>

As a result, the Sixty-first North Dakota Legislative Assembly passed House Bill 1039 on April 24, 2009.<sup>12</sup> This bill made significant and much needed changes to N.D.C.C. chapter 28-22, pertaining to property exempt from judicial process, and section 47-18-01, defining the homestead exemption.<sup>13</sup> The amendments, which went into effect on August 1, 2009, clarified and revised several of the exemptions, clarified who is able to claim certain exemptions, and revised the value of property to be claimed exempt.<sup>14</sup>

The new exemption laws better reflect current societal needs, provide for inflation rates, are more similar to other states and federal exemptions, and have been revised to address problems encountered with the previous exemption scheme.<sup>15</sup> Despite these revisions and updates, however, the exemption laws are in need of even greater reform.<sup>16</sup> Some have suggested the desirability of a single lump sum exemption.<sup>17</sup> Others have proposed a uniform system of exemptions to use throughout the nation.<sup>18</sup> Another alternative, utilized in other states, involves allowing a debtor to opt for state or federal exemptions in the bankruptcy context.<sup>19</sup>

This note addresses exemption laws in general, including the historical background, purposes, and types of exemption laws. It then discusses

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planning activities, other testimony indicated a lump sum exemption would be too radical of a change, and it would be difficult to determine an appropriate value for the exemption. *Id.*

10. *Id.* Those in opposition to this bill draft thought adding the option of claiming federal exemptions would complicate the current system, make filing for bankruptcy more expensive and complex, and “would allow the federal government to dictate the state’s exemptions.” *Id.*

11. *Id.* at 216-17. The committee submitted the report to the Legislative Council at the biennial meeting of the Council held in November of 2008. *Id.* at 209.

12. *Measure Actions*, NORTH DAKOTA LEGISLATIVE BRANCH, <http://www.legis.nd.gov/assembly/61-2009/bill-actions/BA1039.html> (last visited Sept. 29, 2009).

13. See discussion *infra* Part III.D.2.

14. See N.D. CENT. CODE ch. 28-22 (Supp. 2009).

15. FINAL REPORT, *supra* note 1, at 217.

16. See discussion *infra* Part IV.A-C.

17. See Lowell P. Bottrell, *Comfortable Beds, a Church Pew, a Cemetery Lot, One Hog, One Pig, Six Sheep, One Cow, a Yolk of Oxen or a Horse, and Your Notary Seal: Some Thoughts About Exemptions*, 72 N.D. L. REV. 83, 94-97 (1996) (discussing the desirability of one “wild card” exemption).

18. See Juliet M. Moringiello, *Distinguishing Hogs from Pigs: A Proposal for a Preference Approach to Pre-Bankruptcy Planning*, 6 AM. BANKR. INST. L. REV. 103, 103-04, 120-23 (1998) (explaining why uniformity in exemption laws is desirable).

19. See 11 U.S.C. § 522(b) (2006); see also *Hearing on H.B. 1039 Before the H. Standing Comm.*, 61st Legis. Assemb. (N.D. 2009) [hereinafter *Hearing on H.B. 1039*].

North Dakota's previous exemption scheme and focuses on the changes made by House Bill 1039, including the reasons cited for making the changes. Finally, this article conducts an examination of the proposed reformations of exemption laws.

## II. EXEMPTION LAWS IN GENERAL

An exemption is a "privilege allowed by law to a judgment debtor, by which he may retain property to a certain amount or certain classes of property, free from all liability to levy and sale on execution, attachment, or bankruptcy."<sup>20</sup> For over a century, exemption laws have protected debtors and their dependents, and afforded them significant rights.<sup>21</sup> This section focuses on exemption laws in general. Specifically, this section discusses the historical background of exemption laws, the purpose of exemption laws, and the right to claim property as exempt.

### A. HISTORICAL BACKGROUND OF EXEMPTION LAWS

Exemption laws arose in the United States for various reasons.<sup>22</sup> Canons of decency in early English common law initially provided debtors an exemption for necessary clothing.<sup>23</sup> Exemption laws in English common law eventually evolved to include exemptions for bare essentials, clothing, bedding, and tools of trade.<sup>24</sup> However, these laws reflected little tolerance for debtors and recognized exemptions for bare essentials and only those minimal assets necessary for the debtors' survival.<sup>25</sup> In the United States, the northeastern states adopted similar restrictive exemption laws while the southern and western states responded to the economic depressions of the eighteenth and nineteenth centuries by enacting exemption laws that provided debtors with greater protection.<sup>26</sup>

Early exemption laws were also enacted as a way to encourage settlement.<sup>27</sup> The Federal Homestead Act of 1862 encouraged settlement by exempting newly acquired land from debts accrued prior to the debtor's

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20. BLACK'S LAW DICTIONARY 571 (6th ed. 1990).

21. William T. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 779 (1974) (explaining the general nature of exemption laws).

22. See discussion *infra* Part II.A. (discussing the historical background of exemption laws).

23. Vukowich, *supra* note 21, at 782 (discussing the history of exemption laws in the United States).

24. *Id.* See also *Common Law Exemptions*, 9 CENT. L.J. 2, 3 (1879); Garrard Glenn, *Property Exempt from Creditors' Rights of Realization*, 26 VA. L. REV. 127, 129 (1939).

25. Vukowich, *supra* note 21, at 782.

26. *Id.* at 782-83.

27. *Id.* at 783 (citing George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1290 (1950)).

acquisition of the land.<sup>28</sup> Additionally, many states enacted their own homestead laws which exempted the homestead and, in some states, a certain amount of personal property.<sup>29</sup>

## B. PURPOSES OF EXEMPTION LAWS

Exemption laws serve a variety of purposes.<sup>30</sup> First, exemption laws promote societal interests.<sup>31</sup> Courts have held public policy supports affording debtors exemption rights.<sup>32</sup> One primary policy reason for exemption laws is to “protect the family unit from impoverishment, relieve society of the burden of supplying subsidized housing, and provide debtors with a means to survive . . . .”<sup>33</sup> Exemption laws have also been found to promote the following social functions:

- (1) To provide the debtor with property necessary for his or her physical survival;
- (2) To protect the dignity and the culture and religious identity of the debtor;
- (3) To enable the debtor to rehabilitate himself or herself financially and earn income in the future;
- (4) To protect the debtor’s family from adverse consequences of impoverishment; and
- (5) To shift the burden of providing the debtor and his or her family with minimal financial support from society to the debtor’s creditors.<sup>34</sup>

Protection of the debtor and his or her family, as well as obviating the need for welfare and other public programs to support the debtor, are additional public policy rationales that support the enactment of exemption laws.<sup>35</sup>

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28. *Id.* See Homestead Act of 1862, ch. 75, §§ 1, 4, 8, 12 Stat. 392, 392-93.

29. Vukowich, *supra* note 21, at 783.

30. See discussion *infra* Part II.B (discussing the purposes of exemption laws).

31. See Bottrell, *supra* note 17, at 85 (explaining “[t]he court-enunciated policy for providing exemptions is that exemptions are necessary to fulfill certain societal purposes”).

32. See *Bertozzi v. Swisher*, 81 P.2d 1016, 1017 (Cal. Ct. App. 1938) (stating “the fundamental reason for the enactment of exemption laws is to protect a person, whatever his occupation might be, from being reduced by financial misfortune to abject poverty . . .”).

33. Bottrell, *supra* note 17, at 85 (citing *Norwest Bank Neb. v. Tveten*, 848 F.2d 871, 876 (8th Cir. 1988)). Illustrating the desire to protect innocent family members, N.D.C.C. section 28-22-11 allows a spouse or child over sixteen to claim any of the exemptions should the debtor neglect to do so. See N.D. CENT. CODE § 28-22-11 (2009).

34. Bottrell, *supra* note 17, at 85 (citing *In re Ellingson*, 63 BR. 271, 277-78 (Bankr. N.D. Iowa 1986)); see also *Tveten*, 848 F.2d at 876.

35. Vukowich, *supra* note 21, at 786 (citing *Southwest State Bank v. Quinn*, 424 P.2d 620, 624 (Kan. 1967)).

Another purpose of exemption laws is to rehabilitate the debtor and to encourage the repayment of debts.<sup>36</sup> Exemption laws emphasize rehabilitation of the debtor by exempting wages<sup>37</sup> and occupation-related items<sup>38</sup> to allow the debtor to continue working and to hopefully enable the debtor to repay his or her debts.<sup>39</sup> For example, if wages were not somewhat exempt, creditors would be able to garnish the debtor's entire paycheck.<sup>40</sup> This would leave the debtor little incentive to keep working.<sup>41</sup> Furthermore, if the debtor was not able to exempt occupation-related items such as tools, the debtor might also be unable to work.<sup>42</sup> By exempting wages and occupation-related items, debtors are encouraged to keep working and, accordingly, repay their debts.<sup>43</sup>

Exemption laws also help some debtors avoid bankruptcy.<sup>44</sup> This is beneficial to both debtors and creditors. By ensuring the debtor is not left completely impoverished and by allowing the debtor to continue working, exemption laws will keep some debtors from filing bankruptcy.<sup>45</sup> Bankruptcy avoidance also extends creditors the opportunity to recover the debt owed to them, whether it is voluntarily paid by the debtor or by garnishment of the debtor's wages or assets.<sup>46</sup>

### C. TYPES OF EXEMPTION LAWS

Exemption laws are provided on both the state and federal levels.<sup>47</sup> State exemption laws are enacted by state legislatures and vary from state to state as to the type and amount of exemptions.<sup>48</sup> Federal exemptions are utilized by debtors when filing a petition for bankruptcy and can be found

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36. *Id.* (discussing the often overlooked effects of exemption laws).

37. *See, e.g.*, N.D. CENT. CODE § 28-22-18 (Supp. 2009); *id.* § 32-09.1-03 (2010).

38. *See, e.g., id.* § 28-22-03.1(3). This statute states, in pertinent part:

In addition to the exemptions from all attachment or process, levy and sale upon execution, and any other final process issued from any court, otherwise provided by law, a resident of the state may select . . . . The debtor's aggregate interest, not to exceed one thousand five hundred dollars in value, in any tools, implements, or professional books of the trade of the debtor or the trade of a dependent of the debtor.

*Id.*

39. *See* Vukowich, *supra* note 21, at 786.

40. *Id.* at 787.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *See* discussion *infra* Part II.C (discussing the federal and state law exemptions).

48. 2 COLLIER BANKRUPTCY MANUAL § 522.01 (3d ed. 2009).



in the Bankruptcy Code.<sup>49</sup> This section will provide an overview of both state and federal exemptions.

### 1. *State Law Exemptions*

State law exemptions are found in statutes enacted by the state legislatures.<sup>50</sup> A wide disparity exists in the type and amount of exemptions allowed by different states; however, some exemptions are common in all jurisdictions.<sup>51</sup> The language of statutes providing for exemptions at the state level varies.<sup>52</sup> Some statutes use the word “exempt” to describe the property the debtor may shelter from the claims of creditors.<sup>53</sup> The word “exempt” is commonly left undefined, but is generally held to protect the property described from all forms of legal process.<sup>54</sup>

Another type of exemption statute provides for the exemption of property from “all process.”<sup>55</sup> These statutes list the types of process, such as garnishment, attachment, or sale of execution, that creditors may not utilize, in satisfying their claims, to obtain the property listed in the statute.<sup>56</sup> Most exemption statutes provide protection for the housing, clothing, food, life insurance,<sup>57</sup> earnings, and personal and household possessions.<sup>58</sup> Many also include a dollar amount exemption.<sup>59</sup> State exemption laws are often based on the common needs of residents.<sup>60</sup> For example, North Dakota’s exemption scheme provides for agricultural tools,<sup>61</sup> Arizona’s provides for firefighting equipment,<sup>62</sup> and California’s provides for jewelry, heirlooms, and works of art.<sup>63</sup>

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49. *See* 11 U.S.C. § 522 (2006).

50. *See, e.g.*, MINN. CONST. art. I, § 12; N.D. CONST. art. XI, § 22 (instructing the state legislature to enact laws pertaining to exemptions); S.D. CONST. art. 21, § 4.

51. 2 COLLIER BANKRUPTCY MANUAL, *supra* note 48, § 522.10.

52. Vukowich, *supra* note 21, at 788.

53. *See, e.g.*, CAL. CIV. PROC. CODE §§ 703.010-.150 (Deering Supp. 2010).

54. Vukowich, *supra* note 21, at 788.

55. *See, e.g.*, WIS. STAT. ANN. § 815.18 (West 2009).

56. Vukowich, *supra* note 21, at 788-89.

57. This exemption rests on the theory that a creditor cannot claim any equity in a fund that has not been used as a basis for credit. *See* Reiff v. Armour & Co., 139 P. 633, 635 (Wash. 1914).

58. *See* Kip M. Kaler, *Exemptions, and Some Necessary Pigeon Holes*, 72 N.D. L. REV. 651, 655-59 (1996) (discussing the types of exemptions debtors need).

59. *See, e.g.*, N.D. CENT. CODE § 28-22-03.1(1) (Supp. 2009) (providing a debtor may exempt \$7500 in personal property).

60. *See* Poznanovic v. Maki, 296 N.W. 415, 417 (Minn. 1941). The court recognized the legislature based exemptions provided to its citizens upon “their individual circumstances and necessities . . . .” *Id.* (quoting Grimes v. Bryne, 2 Minn. 89, 104 (Minn. 1858)).

61. *See* N.D. CENT. CODE § 28-22-02(8).

62. *See* ARIZ. REV. STAT. ANN. § 33-1128 (2009).

63. *See* CAL. CIV. PROC. CODE § 704.040 (Deering Supp. 2010).

## 2. Federal Law Exemptions

The federal law exemptions are utilized by debtors when filing a petition for bankruptcy and can be found in the Bankruptcy Code.<sup>64</sup> Section 522 is the principal section providing for exemptions at the federal level.<sup>65</sup> This section lists categories of property a debtor may claim as exempt and places value limits on that property.<sup>66</sup> Congress has given states the right to “opt-out” of the federal exemption scheme.<sup>67</sup> If the debtor’s state has not “opted-out” of the federal exemption scheme, the debtor is able to choose the federal exemptions or the debtor’s state law exemptions when filing a petition for bankruptcy.<sup>68</sup>

The federal exemption scheme allows an exemption for the debtor’s aggregate interest in real or personal property the debtor or a dependent of a debtor uses as a residence, up to the value of \$21,625.<sup>69</sup> Like all exemptions, the dollar amount is only applied to the debtor’s equity in the property.<sup>70</sup> A debtor is also afforded an exemption for an interest, not to exceed \$3450, in one motor vehicle.<sup>71</sup> An exemption is allowed of up to \$550 in any particular item and \$11,525 total for household goods and furnishings used by the debtor or dependent.<sup>72</sup> Furthermore, a debtor is able to exempt an interest of \$1450 in jewelry<sup>73</sup> and \$2175 in any implements, professional

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64. See 11 U.S.C. § 522 (2006). A debtor filing a petition for bankruptcy may exempt property provided for in § 522(d) of the Bankruptcy Code or property provided for in the debtor’s state law exemptions unless the debtor’s state law specifically authorizes against the use of federal exemptions. *Id.* § 522(b).

65. 11 U.S.C. § 522.

66. 2 COLLIER BANKRUPTCY MANUAL, *supra* note 48, § 522.09. The value limits of certain exemptions are adjusted every three years to reflect changes in the *Consumer Price Index for All Urban Consumers*, which is published by the Department of Labor. 11 U.S.C. § 104(b)(1).

67. See *supra* note 64 and accompanying text. The following states have “opted-out” of the federal exemption scheme by enacting legislation prohibiting their residents from electing the federal exemptions: Alabama, Arizona, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming. 2 COLLIER BANKRUPTCY MANUAL, *supra* note 48, § 522.01.

68. 11 U.S.C. § 522(b). If the debtor chooses to claim exemptions under state law, the state under whose law the debtor must claim exemptions is the state in which the debtor has been domiciled for 730 days preceding the filing of the bankruptcy petition. *Id.* § 522(b)(3)(A). If the debtor had not been domiciled in one state for the entire 730 days, the applicable state law is that of the state in which the debtor was domiciled for 180 days immediately preceding the 730-day period or for the longer portion of the 180 days. *Id.*

69. 11 U.S.C.A. § 522(d)(1) (West 2010). The dollar amounts of the federal exemptions are adjusted every three years to account for inflation. 11 U.S.C. § 104(e). This article will cite to the United States Code Annotated to provide the most up to date dollar amounts.

70. 2 COLLIER BANKRUPTCY MANUAL, *supra* note 48, § 522.09.

71. 11 U.S.C.A. § 522(d)(2).

72. *Id.* § 522(d)(3).

73. *Id.* § 522(d)(4).

books, or tools of trade.<sup>74</sup> Additionally, the debtor is allowed a general exemption of \$1140 in any property, plus up to \$10,825 of any unused portion of the homestead exemption provided for in § 522(d)(1).<sup>75</sup>

The federal scheme allows the debtor to claim some exemptions in an unlimited amount. Under federal law, a debtor, in a state that has not opted-out of the federal exemption scheme, who chooses federal exemptions when filing a petition for bankruptcy, is allowed an exemption of any unmaturing life insurance contract owned by the debtor.<sup>76</sup> However, this exemption refers only to the life insurance contract itself and does not include any other rights afforded under the contract, including the right to borrow the loan value.<sup>77</sup> While the exemption for an unmaturing life insurance contract sets no limit on the value of the life insurance contract that may be exempted, a debtor is only allowed to exempt up to \$11,525 on the loan value of a policy.<sup>78</sup> A debtor is afforded an unlimited exemption for professionally prescribed health aids used by the debtor or a dependent.<sup>79</sup> A debtor may also exempt the right to receive certain benefits akin to future earnings, such as social security, unemployment compensation, a local public assistance benefit, a veteran's benefit, or a disability or illness benefit.<sup>80</sup> An exemption is allowed for the right to receive property that is compensation of certain types of losses, such as an award under a crime victim's reparation law, wrongful death benefits, "payment under a life insurance contract that insured the life of [a person upon] whom the debtor was a dependent," and payment for bodily injury of up to \$21,625.<sup>81</sup> Furthermore, a debtor may exempt retirement funds to the extent they are in a fund or account exempted from taxation under certain sections of the Internal Revenue Code.<sup>82</sup>

In addition, if a debtor resides in a state that has not opted-out of the federal exemption scheme, and has chosen to use state law exemptions, a debtor may not exempt any amount of interest acquired during the 1215-day

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74. *Id.* § 522(d)(6).

75. *Id.* § 522(d)(5). The purpose of allowing a debtor to add any unused portion of the homestead to this exemption value limit is to ensure non-homeowners are not discriminated against when filing for bankruptcy. 2 COLLIER BANKRUPTCY MANUAL, *supra* note 48, § 522.09.

76. 11 U.S.C. § 522(d)(7) (2006).

77. 2 COLLIER BANKRUPTCY MANUAL, *supra* note 48, § 522.09.

78. 11 U.S.C.A. § 522(d)(8) (West 2010). This exemption includes any accrued dividend or interest in the policy up to the value limit. 2 COLLIER BANKRUPTCY MANUAL, *supra* note 48, § 522.09. The value limit of this exemption is reduced by any amount of property transferred by the estate in the manner specified in § 542(d). *Id.* This is to "protect life insurance companies that are required by contract to make automatic premium loans from property of the debtor's [bankruptcy] estate." *Id.*

79. 11 U.S.C. § 522(d)(9) (2006).

80. *Id.* § 522(d)(10)(A)-(E).

81. 11 U.S.C.A. § 522(d)(11)(A)-(E) (West 2010).

82. 11 U.S.C. § 522(d)(12) (2006).

period prior to filing bankruptcy that exceeds \$125,000 in real or personal property that the debtor uses as a residence.<sup>83</sup> For example, if a debtor living in Rhode Island, which has a \$300,000 homestead exemption<sup>84</sup> and has not opted-out of the federal exemption scheme,<sup>85</sup> chose to utilize state exemption laws, the Rhode Island state law homestead exemption of \$300,000 would be limited to \$125,000 if the home had been acquired during the 1215-day period prior to filing bankruptcy.<sup>86</sup> In essence, this section limits a debtor's "forum-shopping" for states with liberal homestead exemptions.

### III. NORTH DAKOTA EXEMPTION LAWS

The right of a debtor to claim exempt property in North Dakota is provided for in the North Dakota Constitution and statutes.<sup>87</sup> N.D.C.C. chapter 28-22 and section 47-18-01 are the primary exemption statutes relating to judicial process and bankruptcy in North Dakota.<sup>88</sup> This section provides an overview of North Dakota's exemption laws prior to the enactment of House Bill 1039 on August 1, 2009.<sup>89</sup>

#### A. RIGHT TO CLAIM EXEMPTIONS IN NORTH DAKOTA

A debtor has the right to claim certain items of property as exempt, thereby keeping the property from the reach of creditors and the bankruptcy trustee.<sup>90</sup> In North Dakota, the right of a debtor to claim property as exempt derives from the North Dakota Constitution and from various statutes.<sup>91</sup> The state constitution entitles a debtor to exempt a reasonable amount of property and directs the legislature to enact laws determining reasonable amounts of property.<sup>92</sup>

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83. *Id.* § 522(p)(1)(A).

84. R.I. GEN. LAWS § 9-26-4.1 (Supp. 2009).

85. *See id.* § 9-26-4(12) (stating "[t]his exemption shall also apply to the operation of the Federal Bankruptcy Code . . .").

86. *See* 11 U.S.C. § 522(p)(1)(A).

87. *See* discussion *supra* Part II.C.1-2.

88. *See* N.D. CENT. CODE ch. 28-22 (2009); *id.* § 47-18-01.

89. *See* discussion *infra* Part III.A-B (detailing the exemption laws in North Dakota prior to the legislative changes in 2009).

90. *Hearing on H.B. 1039, supra* note 19.

91. *See* discussion *supra* Part II.C (discussing the origin of an individual's right to claim exemptions in North Dakota).

92. *See* Bottrell, *supra* note 17, at 87.

### 1. *Constitutional Right*

In North Dakota, much like other states, a debtor's right to claim exemptions can be found in the state constitution.<sup>93</sup> The North Dakota Constitution provides in pertinent part:

The right of the debtor to enjoy the comforts and necessities of life shall be recognized by wholesome laws, exempting from forced sale to all heads of families a homestead, the value of which shall be limited and defined by law; and a reasonable amount of personal property; the kind and value shall be fixed by law. This section shall not be construed to prevent liens against the homestead for labor done and materials furnished in the improvement thereof, in such manner as may be prescribed by law.<sup>94</sup>

The state constitution enables a debtor to exempt a homestead and a reasonable amount of property, but allows the North Dakota Legislature to define the homestead and to determine what is a reasonable amount of property.<sup>95</sup> The legislature has defined these terms in various statutes.<sup>96</sup>

### 2. *Statutory Right*

The North Dakota Legislature has enacted various statutes regarding a debtor's right to exemptions.<sup>97</sup> The definition of homestead is established in section 47-18-01 of the N.D.C.C.<sup>98</sup> The statute, in relevant part, defines the homestead as:

The homestead of any individual, whether married or unmarried, residing in this state consists of the land upon which the claimant resides, and the dwelling house on that land in which the homestead claimant resides, with all its appurtenances, and all other

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93. N.D. CONST. art. XI, § 22. *See also, e.g.*, MINN. CONST. art. I, § 12. This section provides as follows:

No person shall be imprisoned for debt in this state, but this shall not prevent the legislature from providing for imprisonment, or holding to bail, persons charged with fraud in contracting said debt. A reasonable amount of property shall be exempt from seizure or sale for the payment of any debt or liability. The amount of such exemption shall be determined by law. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same, and provided further, that such liability to seizure and sale shall also extend to all real property for any debt to any laborer or servant for labor or service performed.

*Id.*

94. N.D. CONST. art. XI, § 22.

95. *Id.*

96. *See discussion infra* Part III.A.2.

97. *See discussion infra* Part III.A.2.

98. N.D. CENT. CODE § 47-18-01 (Supp. 2009).

improvements on the land, the total not to exceed one hundred thousand dollars . . . .<sup>99</sup>

Additional property a debtor can exempt, value limitations, and who may claim the exemption are addressed in N.D.C.C. chapter 28-22.<sup>100</sup> Additional exemptions are contained throughout the N.D.C.C. and are not addressed in this article.<sup>101</sup>

#### B. CHAPTER 28-22 EXEMPTIONS PRIOR TO AUGUST 1, 2009

N.D.C.C. chapter 28-22 provides for property a debtor is able to exempt from all process in North Dakota.<sup>102</sup> The statute previously defined “process” as “attachment, or mesne process and from levy and sale upon execution and from any other final process issued from any court.”<sup>103</sup> North Dakota’s exemption scheme divides exemptions into two categories: the first category describes specific items and classes of exempt property; the second places a value limit on property the debtor may choose to exempt.<sup>104</sup>

The first category of exempt property describes specific items and classes of exempt property. Prior to August 1, 2009, property that was absolutely exempt under North Dakota’s exemption scheme included family pictures, a pew or other sitting in a house of worship, a burial lot, the family Bible, other books, wearing apparel, clothing of the debtor and the debtor’s family, fuel necessary for one year, the homestead, crops and grain raised on less than or equal to one hundred sixty acres of land, insurance benefits resulting from insurance covering any or all of the absolute exemptions, and a housetrailer or mobile home.<sup>105</sup> With the exception of the homestead,<sup>106</sup> these items and classes of property were not restricted by

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99. *Id.*

100. *Id.* ch. 28-22.

101. *See, e.g., id.* § 26.1-33-36 (exempting rights in life policies from claims of creditors; *id.* § 32-09.1-03 (exempting social security benefits or veterans’ disability benefits from earnings subject to garnishment); *id.* § 37-26-06 (exempting Operation Desert Shield and Desert Storm Veterans’ compensation payments); *id.* § 37-27-06 (exempting War and Armed Conflict Veterans’ compensation payments); *id.* § 52-06-30 (exempting unemployment benefits); *id.* § 65-05-29 (exempting workforce safety and insurance compensation payments).

102. *See id.* ch. 28-22.

103. *Id.* § 28-22-01 (2006) (amended 2009).

104. *See* John S. Foster, *Fresh Start Lien Avoidance Under the Bankruptcy Code Utilizing North Dakota Exemptions*, 69 N.D. L. REV. 203, 205-06 (1993).

105. *See* N.D. CENT. CODE § 28-22-02(1) to (10) (2006) (amended 2009).

106. *See id.* § 28-22-02(7) (2006) (amended 2009) (stating the homestead as created, defined, and limited by law is absolutely exempt from all process, levy, or sale). Prior to August 1, 2009, the homestead was limited by law to a value of \$80,000, over and above liens or encumbrances or both. *Id.* § 47-18-01 (1999) (amended 2009).

any value limitations; rather, they were described as “absolutely exempt from all process, levy, or sale.”<sup>107</sup>

The second set of exemptions contained in chapter 28-22 applies to property the debtor would seek to exempt and places a value limitation on that property. Prior to August 1, 2009, the North Dakota exemption scheme provided for an additional \$5000 exemption in any personal property, goods, chattels, merchandise, or money for the head of a family.<sup>108</sup> If the debtor was not claiming the homestead exemption, \$7500 in additional property could be exempted “in lieu of” the homestead.<sup>109</sup> A debtor could also claim a motor vehicle exemption limited in value to \$1200, or \$32,000 if the motor vehicle had been modified to accommodate an individual with a permanent physical disability.<sup>110</sup> Pensions, annuity plans or policies, and life insurance policies were also exempt subject to the value limitations of \$100,000 for each account with an aggregate limitation of \$200,000.<sup>111</sup>

### C. NORTH DAKOTA’S HOMESTEAD EXEMPTION PRIOR TO AUGUST 1, 2009

N.D.C.C. section 47-18-01 provides the homestead exemption in North Dakota.<sup>112</sup> As previously stated, the right to claim the homestead as exempt

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107. *See id.* § 28-22-02(1) to (10) (2006) (amended 2009).

108. *See id.* § 28-22-03 (2006) (amended 2009). “Head of a family” is defined by N.D.C.C. section 28-22-01.1. This section states:

The phrase “head of a family” as used in this chapter means:

1. The husband or wife when the claimant is a married person.
2. Every person who has residing on the premises with the person and under the person’s care and maintenance, any of the following:
  - a. That person’s child or the child of that person’s deceased spouse, whether by birth or adoption.
  - b. A minor brother or sister or the minor child of a deceased brother or sister.
  - c. A father, mother, grandfather, or grandmother.
  - d. The father or mother or grandfather or grandmother of a deceased husband or wife.
  - e. Any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves.
3. Every person who provides support for unmarried minor children of a previous marriage of the person, even though the children do not reside on the premises with the person.

*Id.* But see *In re Hankel*, 223 B.R. 728, 733 (Bankr. D.N.D. 1998) (holding debtor was not entitled to the \$5000 exemption accorded under section 28-22-03 of the N.D.C.C. to any debtor who qualified as “head of a family” merely because he provided some care to his seventy-two-year-old parent with whom he resided).

109. *See* N.D. CENT. CODE § 28-22-03.1(1) (2006) (amended 2009).

110. *See id.* § 28-22-03.1(2) (2006) (amended 2009).

111. *Id.* § 28-22-03.1(3) (2006) (amended 2009).

112. *See id.* § 47-18-01 (1999) (amended 2009).

in North Dakota is not only statutory, but also constitutional.<sup>113</sup> Prior to August 1, 2009, the homestead exemption consisted of the land upon which the person resided and “the dwelling house on that land in which the homestead claimant resides, with all its appurtenances, and all other improvements on the land, the total not to exceed eighty thousand dollars in value, over and above liens or encumbrances or both.”<sup>114</sup> This section further provided the homestead was exempt from judgment lien and from execution or forced sale, except as provided by law, and also provided the homestead could not include different lots or tracts of land unless they were contiguous.<sup>115</sup>

#### D. HOUSE BILL 1039

##### 1. *Procedural History*

The Judicial Process Committee drafted House Bill 1039 for the Sixty-first Legislative Assembly.<sup>116</sup> The bill was introduced to the North Dakota House of Representatives on January 6, 2009, where it was referred to the Judiciary Committee.<sup>117</sup> The House passed the bill unanimously on January 13, 2009.<sup>118</sup> The bill then went to the North Dakota Senate on January 14, 2009, where it was also referred to the Judiciary Committee.<sup>119</sup> The Judiciary Committee amended the bill, and the Senate passed the amended version on March 23, 2009.<sup>120</sup> The bill was returned to the House of Representatives, which refused to concur with the Senate’s amendments.<sup>121</sup>

A Conference Committee was formed, which included Representatives Klemin, Dahl, and Wolf, and Senators Lyson, Nething, and Fiebiger.<sup>122</sup> The House of Representatives, on April 21, 2009, and the Senate, on April 22, 2009, adopted the Conference Committee Report.<sup>123</sup> The President of

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113. See discussion *supra* Part III.A.1-2 (explaining where the right to claim exemptions derives from in North Dakota).

114. N.D. CENT. CODE § 47-18-01 (1999) (amended 2009).

115. *Id.*

116. FINAL REPORT, *supra* note 1, at 217.

117. *Measure Actions*, *supra* note 12.

118. *Id.*

119. *Id.*

120. *Id.* The amendments the Senate made were related to the homestead exemption. *Hearing on H.B. 1039*, *supra* note 19. The original House version of the bill provided for a homestead exemption of \$200,000. *Id.* The Senate version decreased that amount to \$125,000. *Id.* The Standing Committee concluded the homestead exemption should be valued at \$100,000, which was ultimately agreed upon by the Senate and House of Representatives. See N.D. CENT. CODE § 47-18-04 (Supp. 2009).

121. *Measure Actions*, *supra* note 12.

122. *Id.*

123. *Id.*



the Senate, the Speaker of the House, and the Governor signed House Bill No. 1039 on April 24, 2009.<sup>124</sup> The bill was filed with the North Dakota Secretary of State on April 29, 2009, and the law went into effect on August 1, 2009.<sup>125</sup>

## 2. *Changes Made by House Bill 1039*

Prior to drafting House Bill 1039, the Judicial Process Committee conducted a study and received testimony that indicated North Dakota's exemption scheme needed to be updated, clarified, and revised.<sup>126</sup> House Bill 1039 clarified and revised several of the absolute exemptions, such as family books, clothing and wearing apparel, and fuel.<sup>127</sup> The bill also clarified the definition of "head of a family."<sup>128</sup> The motor vehicle exemption was increased and clarified, and the bill revised the exemption for a housetrailer or mobile home.<sup>129</sup> In addition, House Bill 1039 placed limits on the time period an individual may contribute to a retirement account claimed as exempt and increased the additional "head of a family" exemption.<sup>130</sup> The bill also eliminated the maximum amount of compensation a debtor may claim as exempt on account of the debtor's right to receive money or property traceable to a wrongful death or personal injury claim.<sup>131</sup>

House Bill 1039 revised and clarified several of the absolute exemptions contained in N.D.C.C. section 28-22-02. Previously, this section provided for the absolute exemption of "[t]he family Bible and all schoolbooks used by the family and all other books used as a part of the family library not exceeding in value one hundred dollars."<sup>132</sup> The Judicial Process Committee updated this archaic language to state: "One family Bible or other family primary religious text and all schoolbooks used by the family and all other books used as a part of the family library."<sup>133</sup> By adding the language "or other primary religious text," the legislature addressed the need for an exemption of religious texts other than the Bible to accommodate the wide variety of religions.<sup>134</sup> Also, the bill limited this exemption to only one

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124. *Id.*

125. *Id.*

126. FINAL REPORT, *supra* note 1, at 214-17.

127. *See id.* at 215.

128. *See id.*

129. *See id.*

130. *See id.* at 215-16.

131. *See id.* at 216.

132. N.D. CENT. CODE § 28-22-02(4) (2006) (amended 2009).

133. *Id.* § 28-22-02(4) (2009).

134. *See* FINAL REPORT, *supra* note 1, at 215.

religious text, but lifted the value restriction on all other books used by the debtor and the debtor's family.<sup>135</sup>

The absolute exemption for wearing apparel and clothing was also revised by House Bill 1039. This exemption previously provided for "[a]ll wearing apparel and clothing of the debtor and the debtor's family."<sup>136</sup> To address the issue of what constitutes "wearing apparel" and to place a value limit on the exemption, the bill amended the exemption to state: "All wearing apparel, not exceeding five thousand dollars in value, and all clothing of the debtor and the debtor's family."<sup>137</sup> Courts in the past have exempted a mink coat valued at \$2500,<sup>138</sup> diamond wedding rings,<sup>139</sup> and gold wrist watches<sup>140</sup> by holding these items constitute "wearing apparel." By placing the exemption limitation at \$5000 for "wearing apparel," the legislature attempted to ensure a debtor is not able to exempt an exorbitant amount of luxury items.<sup>141</sup> This also promotes the policy behind exemptions, which is to allow the debtor to retain items only necessary to survival.<sup>142</sup>

Additionally, House Bill 1039 clarified the absolute exemption for one year's supply of fuel. The exemption formerly provided for "[t]he provisions for the debtor and the debtor's family necessary for one year's supply, either provided or growing, or both, and fuel necessary for one year."<sup>143</sup> This exemption created confusion as to what type of fuel the exemption referred to.<sup>144</sup> The statute was also unclear as to whether fuel to heat a home, fuel to propel a car, or both types were exempt.<sup>145</sup> Questions also arose as to whether the fuel had to be actual property of the debtor or whether a separate account designated "money for fuel" could fit into the exemption.<sup>146</sup> To address these issues, House Bill 1039 amended this section to

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135. Compare N.D. CENT. CODE § 28-22-02(4) (2006) (amended 2009), with *id.* § 28-22-02(4) (2009).

136. *Id.* § 28-22-02(5) (2006) (amended 2009).

137. *Id.* § 28-22-02(5) (2009). "Wearing apparel" in exemption schemes is usually given its ordinary meaning, which includes dress or clothing of all kinds used by the debtor to meet the changes of climate and the customary habits and ordinary necessities of society. See *Milwaukee Accredited Schs. of Beauty Culture v. Patti*, 296 N.W. 616, 617 (Wis. 1941). Some courts, however, have held "wearing apparel" can include more than articles of clothing, as long as the items are necessary to be worn by the debtor. See *In re Westhem*, 642 F.2d 1139, 1140 (9th Cir. 1981); *In re Goldberg*, 59 B.R. 201, 208 (Bankr. N.D. Okla. 1986).

138. *In re Perry*, 6 B.R. 263, 264 (Bankr. W.D. Va. 1980).

139. *Milwaukee Accredited Schs.*, 296 N.W. at 619.

140. *Id.*

141. See FINAL REPORT, *supra* note 1, at 215.

142. *Id.* at 214.

143. N.D. CENT. CODE § 28-22-02(6) (2006) (amended 2009).

144. See FINAL REPORT, *supra* note 1, at 215.

145. *Id.*

146. See *In re Janz*, 74 B.R. 32, 33 (Bankr. D.N.D. 1987) (holding exemptions for provisions and fuel necessary for the debtor and his family for one year was an "*in kind, in specie*" exemption

read: “The in-kind provisions for the debtor and the debtor’s family necessary for one year’s supply, either provided or growing, or both, and in-kind fuel necessary for heating the debtor’s home or operating the debtor’s motor vehicle for one year.”<sup>147</sup>

Previously, the absolute exemption pertaining to insurance benefits “resulting from insurance covering any or all of the absolute exemptions” allowed for the entire value of insurance benefits to be completely exempted.<sup>148</sup> The committee was concerned this would allow a debtor to use the insurance benefits from exempt property to purchase non-exempt property.<sup>149</sup> For example, insurance benefits from a house fire could be used to purchase a snowmobile. It could then be argued the snowmobile was purchased with insurance benefits from insurance covering the homestead, which is an absolute exemption, and because insurance benefits are completely exempt, the snowmobile would then be exempt. To address this potential problem, House Bill 1039 added the language “if the insurance benefits are in cash or have been invested in other property capable of exemption under this chapter” to the end of the statute.<sup>150</sup> Now, for insurance benefits to be exempt, they must be in cash or invested in property capable of being exempted by North Dakota law.<sup>151</sup> This eliminates the potential for a debtor to abuse the exemption scheme by using insurance benefits to exempt property the legislature intended not to be exempt.

The absolute exemption pertaining to a house trailer or mobile home was also revised by House Bill 1039. This exemption previously provided for “[a]ny house trailer or mobile home occupied as a residence by the debtor or the debtor’s family . . . .”<sup>152</sup> Testimony made to the Committee indicated that, because the exemption placed no value limit on the house trailer or mobile home, it would be possible for someone living in a house trailer or mobile home valued at more than \$80,000 to claim that residence as exempt; therefore, that debtor would receive more of an advantage than a debtor claiming the homestead exemption.<sup>153</sup> To solve this problem, the bill revised the statute to state:

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pertaining only to provisions and fuel and did not entitle the debtor to exempt cash or other property in a dollar amount equal to the exemption).

147. N.D. CENT. CODE § 28-22-02(6) (2009).

148. *Id.* § 28-22-02(9) (2006) (amended 2009).

149. *Hearing on H.B. 1039, supra* note 19 (testimony of Vonette Richter, Legislative Council).

150. N.D. CENT. CODE § 28-22-02(9) (2009).

151. *Id.*

152. *Id.* § 28-22-02(10) (2006) (amended 2009).

153. *Hearing on H.B. 1039, supra* note 19 (excerpt from the 2009 Legislative Council Final Report).

In lieu of the homestead, and subject to the same value limitations that exist with respect to the homestead exemption, any house-trailer or mobile home occupied as a residence by the debtor or the debtor's family . . . . This section does not preclude the debtor from claiming a mobile home as a dwelling house as part of the homestead.<sup>154</sup>

The statute now provides that a debtor living in a mobile home or house-trailer may exempt that residence to the same extent as the homestead exemption.<sup>155</sup> Also, by adding the "in lieu of" language, the statute eliminates the potential problem of a debtor exempting a house under the homestead exemption and a mobile home or housetrailer under this exemption.<sup>156</sup>

House Bill 1039 next revised the additional exemption for head of a family provided by N.D.C.C. section 28-22-03. This exemption previously provided in addition to the absolute exemptions, the head of a family could exempt an additional \$5000 in other personal property, goods, chattels, merchandise, or money.<sup>157</sup> Testimony indicated that, despite the fact the statute specifically stated the exemption was for personal property, there had been numerous attempts by debtors to use this exemption on real estate.<sup>158</sup> House Bill 1039 eliminated those attempts by adding the language: "The exemption under this section may not be used to exempt a real estate interest of any kind."<sup>159</sup> The value of this exemption was also increased to \$7500.<sup>160</sup>

Next, a resident's right to exempt \$7500 in lieu of the homestead exemption was revised. Previously, a resident not claiming the homestead exemption was entitled to exempt up to \$7500 of property in addition to the absolute exemptions.<sup>161</sup> Testimony indicated the use of the word "resident" raised the issue of whether this term was different than "head of a family."<sup>162</sup> If the terms are defined differently, then theoretically a married couple could have one spouse utilize the "head of a family" exemption and claim the homestead, while the other spouse, who is a resident, could

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154. N.D. CENT. CODE § 28-22-02(10) (2009).

155. *Id.*

156. *See id.*

157. *Id.* § 28-22-03 (2006) (amended 2009).

158. *Hearing on H.B. 1039, supra* note 19 (excerpt from the 2009 Legislative Council Final Report).

159. N.D. CENT. CODE § 28-22-03 (2009).

160. *Id.*

161. *Id.* § 28-22-03.1(1) (2006) (amended 2009).

162. *Hearing on H.B. 1039, supra* note 19 (excerpt from the 2009 Legislative Council Final Report).

choose the “in lieu of homestead” exemption.<sup>163</sup> The court in *In re Janz* held the use of the homestead exemption by one spouse to exempt both the spouse’s interest in the homestead precluded the other spouse from utilizing the “in lieu of homestead” exemption provided for in N.D.C.C. section 28-22-03.1(1).<sup>164</sup> To remedy the potential benefit joint married debtors might be given which a single person could not obtain, House Bill 1039 codified the court’s holding in *Janz* and added language to the statute providing: “This exemption is not available if the resident exemption claimant, the spouse of the resident exemption claimant, or other head of the family of the resident exemption claimant has chosen the homestead exemption provided for under subsection 7 of section 28-22-02.”<sup>165</sup>

House Bill 1039 also updated the motor vehicle exemption. A debtor was formerly able to exempt \$1200 of a motor vehicle.<sup>166</sup> Testimony pointed out this amount was generally interpreted to mean “\$1,200 in equity over and above liens and encumbrances.”<sup>167</sup> House Bill 1039 clarified and increased this exemption by amending the statute to exempt “[a] motor vehicle exemption in one vehicle not to exceed two thousand nine hundred fifty dollars in value over security interests and liens upon that vehicle . . . .”<sup>168</sup> Although \$2950 may seem like a small amount for a motor vehicle exemption, a debtor can also apply the additional exemption of \$7500 provided for in section 28-22-03 to a motor vehicle.<sup>169</sup>

House Bill 1039 modified the exemption pertaining to pensions, annuities, and life insurance policies. North Dakota’s exemption scheme previously allowed a debtor to exempt up to \$100,000 for each pension, policy, plan, or account with an aggregate limitation of \$200,000 for all pensions, policies, plans, and accounts.<sup>170</sup> Testimony expressed there was a “concern that a debtor might try to convert nonexempt property into exempt property in the face of a threatened judgment execution by, for example, selling a lake cabin that does not qualify as a homestead and putting the money into

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163. See *In re Janz*, 74 B.R. 32, 33 (Bankr. D.N.D. 1987).

164. *Id.*; see also *In re Reismour*, 49 B.R. 406, 409 (Bankr. D.N.D. 1985) (holding “in lieu of homestead exemption” was unavailable for one spouse when the other spouse utilized the homestead exemption).

165. N.D. CENT. CODE § 28-22-03.1(1) (2009).

166. *Id.* § 28-22-03.1(2) (2006) (amended 2009).

167. *Hearing on H.B. 1039*, *supra* note 19 (excerpt from the 2009 Legislative Council Final Report); accord *In re Setley*, 11 B.R. 106, 107 (Bankr. D.Minn. 1981).

168. N.D. CENT. CODE § 28-22-03.1(2) (2009).

169. See *id.* § 28-22-03 (providing for a \$7500 exemption in personal property in addition to the absolute exemptions); see also *In re Barker*, 768 F.2d 191, 196 (7th Cir. 1985) (holding a debtor may be able to “stack” exemptions by applying the general exemption amount to a motor vehicle after the specific vehicle exemption amount is exhausted in order to increase the total exempt amount available).

170. N.D. CENT. CODE § 28-22-03.1(3) (2006) (amended 2009).

an exempt IRA.”<sup>171</sup> House Bill 1039 revised the statute to provide an exemption for: “Retirement funds that have been in effect for at least one year . . . . The value of those assets exempted may not exceed one hundred thousand dollars for any one account or two hundred thousand dollars in aggregate for all accounts.”<sup>172</sup> Adding the requirement that the retirement fund be in effect for at least one year prior to allowing the account to be exempt was to deter abuse by the debtor.<sup>173</sup>

House Bill 1039 also amended the exemption regarding a debtor’s right to receive property or payment on account of wrongful death or bodily injury. Previously, the debtor’s right to receive payment or property that was traceable to a payment on account of the wrongful death of an individual of whom the debtor was a dependent or on account of personal bodily injury was exempt up to \$7500.<sup>174</sup> House Bill 1039 eliminated the maximum amount of compensation that may be claimed as exempt on account of the debtor’s right to receive payment or property that is traceable to the payment of a wrongful death claim.<sup>175</sup> The amount of payment or property traceable to the payment on account of personal bodily injury was increased to exempt \$18,450, not including pain and suffering or actual pecuniary loss.<sup>176</sup> The bill also added an exemption for property that was traceable to an award under a crime victim’s reparation law, “payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent[.]” and payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor was a dependent.<sup>177</sup> The legislature was concerned with allowing a debtor to exempt enough payment of a personal injury settlement or judgment to ensure continual care for the victim, whether the victim is the debtor or a dependent of the debtor.<sup>178</sup>

House Bill 1039 also made significant revisions to North Dakota’s homestead exemption. First, the previous homestead exemption stated: “In no case shall the homestead embrace different lots or tracts of land unless

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171. *Hearing on H.B. 1039, supra* note 19 (excerpt from the 2009 Legislative Council Final Report); *see also* Bottrell, *supra* note 17, at 83 (suggesting the exemption scheme fosters improper pre-bankruptcy planning by encouraging debtors to convert non-exempt property into exempt form on the eve of bankruptcy).

172. N.D. CENT. CODE § 28-22-03.1(7) (2009).

173. *Hearing on H.B. 1039, supra* note 19 (excerpt from the 2009 Legislative Council Final Report).

174. N.D. CENT. CODE § 28-22-03.1(4)(a)-(b) (2006) (amended 2009).

175. *Id.* § 28-22-03.1(9)(b) (2009).

176. *Id.* § 28-22-03.1(9)(d).

177. *Id.* § 28-22-03.1(9)(a), (c), (e).

178. *Hearing on H.B. 1039, supra* note 19 (statement of Rep. Lois Delmore).

they are contiguous.”<sup>179</sup> However, the word “contiguous” was not statutorily defined.<sup>180</sup> House Bill 1039 resolved this issue by adding the language: “For purposes of this section, ‘contiguous’ means two or more tracts of real property which share a common point or which would share a common point but for an intervening road or right of way.”<sup>181</sup>

Next, the value of the homestead exemption was addressed. The total of the homestead exemption was formerly not to exceed \$80,000, over and above liens and encumbrances, or both.<sup>182</sup> That amount had not been adjusted since 1979.<sup>183</sup> House Bill 1039 increased the value of the homestead to the amount of \$100,000, over and above liens and encumbrances, or both.<sup>184</sup> The legislature arrived at this amount by examining inflation rates,<sup>185</sup> looking to neighboring states,<sup>186</sup> and considering the federal homestead exemption.<sup>187</sup>

#### IV. PROPOSED CHANGES TO THE CURRENT EXEMPTION SCHEME IN NORTH DAKOTA

Although House Bill 1039 made much needed updates and clarifications to North Dakota’s exemption scheme, there still remains much room for reform. A single exemption could benefit both debtors and creditors, as well as the court system.<sup>188</sup> Allowing a debtor to choose between state and federal exemptions in bankruptcy could also increase the efficiency of filing for bankruptcy in North Dakota.<sup>189</sup> Further, nationwide uniformity in exemption laws would reduce unfair treatment received by debtors and creditors across state lines.<sup>190</sup>

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179. N.D. CENT. CODE § 47-18-01 (1999).

180. See *In re Schriock*, 192 B.R. 514, 515 (Bankr. D.N.D. 1995) (noting “contiguous” was not statutorily defined, but holding city lots, although contiguous, are not exempt).

181. N.D. CENT. CODE § 47-18-01 (2009).

182. *Id.* § 47-18-01 (1999) (amended 2009).

183. *Hearing on H.B. 1039*, *supra* note 19 (statement of Sen. Fiebiger).

184. N.D. CENT. CODE § 47-18-01 (2009).

185. Two inflation indexes were used and it was found that \$80,000 in 1979 would be \$249,120 or \$224,390.08 in 2009. *Hearing on H.B. 1039*, *supra* note 19 (statement of Sen. Fiebiger).

186. Minnesota’s homestead exemption is \$300,000. MINN. STAT. § 510.02 (2011).

187. The federal homestead exemption for an individual is \$21,625. 11 U.S.C.A. § 522(d)(1) (West 2010). However, if a debtor chooses to use a state law homestead exemption and resides in a state that has not opted out of the federal exemption scheme, the state law homestead exemption is limited to \$146,450 if purchased in the 1215-day period prior to filing bankruptcy. *Id.* § 522(p)(1).

188. See Bottrell, *supra* note 17, at 94-96.

189. *Hearing on H.B. 1039*, *supra* note 19.

190. See Moringiello, *supra* note 18, at 120-24 (explaining why uniformity in exemption laws is desirable).

## A. SINGLE EXEMPTION THEORY

One proposed alternative to the current exemption scheme is a single “wild card” exemption.<sup>191</sup> This approach suggests having one exemption with a specific dollar amount.<sup>192</sup> The debtor is then able to choose what property to exempt up to that dollar amount.<sup>193</sup> North Dakota currently has in effect similar “wild card” exemptions.<sup>194</sup> In North Dakota, if the debtor does not claim the homestead exemption, the debtor may exempt property up to \$7500 in value.<sup>195</sup> Furthermore, North Dakota exemption laws allow a debtor to claim an additional \$7500 in personal property, such as goods, chattels, merchandise, or money.<sup>196</sup>

This “wild card” exemption would eliminate the need for the legislature to determine what is a necessity and what property would be most beneficial for the debtor to retain.<sup>197</sup> It would also eliminate the need for courts to decide if property the debtor is seeking to exempt fits into a certain category of exemption.<sup>198</sup> The need for pre-bankruptcy planning would also decrease.<sup>199</sup> Debtors would not be encouraged to convert their non-exempt property into exempt property on the “eve of bankruptcy.”<sup>200</sup>

While contemplating a bill to amend exemption laws in North Dakota, the Judicial Process Committee considered a bill draft that provided for a lump sum exemption in the amount of \$40,000.<sup>201</sup> Under this bill draft, however, in addition to the lump sum exemption, the homestead exemption would have remained available for the debtor.<sup>202</sup> Additionally, the bill draft allowed exemptions for:

[P]rofessionally prescribed health aids; an unmatured life insurance contract owned by the debtor; the debtor’s interest in certain retirement plans; and certain benefits, including Social Security benefits, veterans’ disability pension benefits, disability, illness, or unemployment benefits, alimony, support, or separate

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191. See Bottrell, *supra* note 17, at 94-97 (discussing the desirability of a single “wild card” exemption). But see Kaler, *supra* note 58, at 659-60 (discussing the effects a single “wild card” exemption would have).

192. See Bottrell, *supra* note 17, at 94-97.

193. *Id.* at 96.

194. *Id.*

195. N.D. CENT. CODE § 28-22-03.1(1) (2009).

196. *Id.* § 28-22-03.

197. See Bottrell, *supra* note 17, at 95-96.

198. *Id.* at 96.

199. *Id.*

200. *Id.*

201. FINAL REPORT, *supra* note 1, at 217.

202. *Id.*



maintenance. The bill draft also would have exempted payments received on account of the wrongful death of an individual of whom the debtor was a dependent.<sup>203</sup>

Ultimately, the Committee determined this bill draft would be too radical a change from the current exemption scheme.<sup>204</sup> Although the Committee did consider a number of states have enacted a single lump sum exemption, the Committee determined it would be very difficult to determine an appropriate amount for a “wild card” exemption.<sup>205</sup> The Committee concluded the bill draft providing for a single lump sum exemption would not be recommended to the Legislative Council for consideration.<sup>206</sup>

## B. CHOICE BETWEEN STATE AND FEDERAL EXEMPTIONS

A second alternative to the current exemption scheme in North Dakota is to allow a debtor to choose between state and federal exemptions. As previously stated, section 522 of the federal Bankruptcy Code provides for property that is exempt.<sup>207</sup> It further permits a state to opt-out of the federal exemptions.<sup>208</sup> North Dakota chose to opt-out of the federal bankruptcy exemption scheme in 1981.<sup>209</sup> Some feel this was not the best decision for North Dakota.<sup>210</sup>

The Judicial Process Committee considered a bill draft that would have given North Dakota residents the option of claiming either federal or state exemptions when filing a petition for bankruptcy.<sup>211</sup> However, the Committee ultimately rejected this bill draft and determined it should not be recommended to the Legislative Council.<sup>212</sup> The Committee decided allowing residents to choose between federal and state exemptions would add greater complications to the current system.<sup>213</sup> Additionally, the Committee felt the bill draft would allow the federal government to control North

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203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. See 11 U.S.C. § 522(d) (2006).

208. *Id.* § 522(b); see also *supra* note 64 and accompanying text.

209. See N.D. CENT. CODE § 28-22-17 (2009). This section provides, in part, that “residents of this state are not entitled to the federal exemptions provided in section 522(d) of the Bankruptcy Reform Act of 1978. The residents of this state are limited to claiming those exemptions allowable by North Dakota law.” *Id.* See also, e.g., COLO. REV. STAT. § 13-54-107 (2009); FLA. STAT. ANN. § 222.20 (2008); IOWA CODE § 627.10 (1999); KAN. STAT. ANN. § 60-2312 (2005).

210. *Hearing on H.B. 1039, supra* note 19 (excerpt from the 2009 Legislative Council Final Report).

211. FINAL REPORT, *supra* note 1, at 217.

212. *Id.*

213. See *id.*

Dakota's state exemptions and filing bankruptcy would be more expensive and complex.<sup>214</sup>

### C. UNIFORM EXEMPTION LAWS

One proposed reform suggests mandating a uniform federal exemption scheme.<sup>215</sup> The United States Constitution gives Congress the power to establish uniform bankruptcy laws.<sup>216</sup> Currently, there are federal exemptions and state law exemptions.<sup>217</sup> However, as previously stated, Congress has allowed states to opt-out of the federal exemption scheme.<sup>218</sup> With some states using federal exemptions and others using their own legislatively enacted exemption schemes, much disparity has resulted in the type and amount of property debtors throughout the country may exempt.<sup>219</sup> By mandating a uniform federal exemption scheme, this disparity could be remedied, and the results would be beneficial to both creditors and debtors.<sup>220</sup>

Unfair treatment results from a lack of uniformity in exemption laws.<sup>221</sup> Creditors routinely conduct business that crosses state lines. Uniform exemption laws would make more certain these creditors receive fair treatment nationwide.<sup>222</sup> For example, a bank or other lending institution could be discouraged from giving unsecured loans in states that afford debtors large amounts of exempt property.<sup>223</sup> In the event of default or bankruptcy, if the debtor was able to exempt large amounts of property under state law, the bank's claim could go largely unsatisfied.<sup>224</sup> However, if that same unsecured loan had been granted in a state that allows less property to be exempt, the bank's claim could potentially be wholly satisfied.<sup>225</sup>

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214. *See id.*

215. *See Moringiello, supra* note 18, at 120-24 (explaining why uniformity in exemption laws is desirable).

216. *See* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power To . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").

217. *See* discussion *supra* Part II.C.1-2.

218. *See* 11 U.S.C. § 522(b) (2006). Under federal law, the debtor has a choice between exempting the property listed in § 522(d) or exempting property according to federal non-bankruptcy law and state law as long as the state does not mandate a debtor use state exemptions. *Id.*; *see, e.g.,* N.D. CENT. CODE § 28-22-17 (2006) (limiting residents to claiming only exemptions allowable by North Dakota law).

219. Moringiello, *supra* note 18, at 104.

220. *Id.* at 120.

221. *Id.*

222. *Id.*

223. Interview with Lowell Bottrell, Partner, Anderson, Bottrell, Sanden & Thompson, in Fargo, N.D. (Oct. 1, 2010).

224. *Id.*

225. *Id.*

Uniform exemption laws would remedy this unfair treatment to creditors dealing across state boundaries.<sup>226</sup> A cost of living index could also be utilized to remedy the differences in the cost of living among the different regions of the country to ensure fair exemptions for everyone.

A uniform federal exemption scheme would also be beneficial to debtors.<sup>227</sup> This is especially relevant in the arena of pre-bankruptcy planning. Uniform exemptions would aid those attorneys advising clients seeking to file bankruptcy.<sup>228</sup> Uniformity would also make it easier for debtors to comply with the Bankruptcy Code and, therefore, obtain a discharge. Uniformity in exemption laws could result in the equal and fair treatment of both debtors and creditors.

## V. CONCLUSION

Exemption laws protect debtors and afford them significant rights.<sup>229</sup> The laws promote societal interests, rehabilitate the debtor and encourage the repayment of debts, and they help some debtors avoid bankruptcy.<sup>230</sup> A legislative study conducted in 2009 concluded North Dakota's exemption laws were in need of revision.<sup>231</sup> Many of the statutes no longer served the purpose of providing debtors with basic necessities.<sup>232</sup> As a result of this study, North Dakota's Sixty-first Legislative Assembly passed House Bill 1039 on April 24, 2009.<sup>233</sup> The bill made significant and much needed changes to North Dakota's exemption scheme.<sup>234</sup> The bill, which went into effect August 1, 2009, clarified and revised several of the exemptions, clarified who is able to claim certain exemptions, and revised the value of property that is able to be claimed as exempt.<sup>235</sup>

Although House Bill 1039 made greatly needed updates and clarifications to North Dakota's exemption scheme, there still remains much room for reform. Chapter 7 bankruptcy filings in North Dakota have risen 120% in the past three years.<sup>236</sup> With this sharp increase in bankruptcy filings, exemption reform is critical. A single exemption could provide many bene-

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226. Moringiello, *supra* note 18, at 120.

227. *Id.*

228. *Id.*

229. Vukowich, *supra* note 21, at 779.

230. See discussion *supra* Part II.B.

231. FINAL REPORT, *supra* note 1, at 215-17.

232. *Id.*

233. *Measure Actions*, NORTH DAKOTA LEGISLATIVE BRANCH, <http://www.legis.nd.gov/assembly/61-2009/bill-actions/BA1039.html> (last visited Sept. 29, 2009).

234. *Id.*

235. See *id.*

236. U.S. Dep't of Justice, *Bankruptcy Statistics-State Charts*, [http://www.justice.gov/ust/eo/public\\_affairs/statistics/stats\\_state.htm](http://www.justice.gov/ust/eo/public_affairs/statistics/stats_state.htm) (follow "Chapter 7 Filings" hyperlink).

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fits to both debtors and creditors, as well as to the court system.<sup>237</sup> Allowing a debtor to choose between state and federal exemptions in bankruptcy could also increase the efficiency of filing for bankruptcy in North Dakota.<sup>238</sup> Moreover, nationwide uniformity in exemption laws would reduce unfair treatment received by debtors and creditors across state lines.<sup>239</sup> It took thirty years for the North Dakota Legislature to update the exemption scheme to its current state; further reform needs to happen much sooner.

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237. See Bottrell, *supra* note 17, at 94-96.

238. *Hearing on H.B. 1039*, *supra* note 19 (excerpt from the 2009 Legislative Council Final Report).

239. See Moringiello, *supra* note 18, at 120-24 (explaining why uniformity in exemption laws is desirable).

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